Manhattan Crowne Plaza Town Park Hotel Corp. *and* Brotherhood of Security Personnel Officers and Guards Union, Petitioner. Case 2–RC–22395

April 28, 2004

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held June 27, 2001, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 5 for and 13 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and brief and, contrary to the Regional Director's recommendations, has decided to overrule Petitioner's Objections 1 and 5 and to certify the results of the election.

Petitioner's Objections 1 and 5 allege that the June 21, 2001 memorandum sent by the Employer to its employees threatened the employees with a loss of benefits and wages and interfered with the employees' free choice. The Employer has excepted to the Regional Director's recommendation that these objections be sustained. For the reasons set forth below, we find merit in the Employer's exceptions.

The Employer is a New York City hotel. The Union is seeking to represent the Employer's security officers. About 1 week prior to the June 27, 2001 election, the Employer's director of safety and security distributed the following memorandum to its security officers (emphasis in original):

> There may be some of you, who despite what I have told you can happen during negotiations, still believe you have nothing to lose by voting yes on June 27th. If you still believe that maybe telling you what happened yesterday at the SOHO Grand Hotel and Tribeca Grand Hotel would show you that it is in your best interest to vote NO.
>
> Yesterday afternoon, after 1 year of negotiating in good faith with the Brotherhood of Security Personnel, Officers and Guard Union without reaching a settlement, the company submitted its final offer to the union. The union rejected that offer, and the company promptly broke off negotiations, contracted with an outside security guard company to provide security services for the hotels, and fired the in-house security personnel.
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> So, in the final analysis, the majority who voted for this union (as well as the minority who voted against it) gained NOTHING, and LOST EVERYTHING! They lost all their medical benefits, their 401K plans, and most importantly, they lost their jobs!
>
> Each set of negotiations is different, however, keep in mind from a wage and benefit perspective, you guys have one of the best employment situations in the industry. In addition, you did not have to pay anyone weekly dues to get this package. Why would you pay someone for the possibility of losing this arrangement?
>
> Promises are easy to make, but difficult to keep. On election day, what you should do is weigh those promises against what you already have, and decide what the likelihood of getting more really is. In doing so, also remember what happened at the SOHO Grand, and Tribeca Grand hotels.
>
> Again, the choice is yours! But really, the only sound choice is to vote NO on June 27, 2001.

The Regional Director found that the Employer's memorandum "clearly implied" that the loss of jobs, benefits, and wages suffered at the other hotels was the Union's fault, and that it predicted similar losses were possible if the employees voted for the Union in the pending election. She then concluded that this implied prediction was an objectionable threat because the Employer failed to provide an objective basis for the belief that, for reasons beyond its control, the employees' selection of the Union as their representative would lead to the same fate.

We have carefully reviewed the record and find that, although the facts present a close case, the Employer's memorandum did not exceed the bounds of permissible campaign statements.

It is well settled that an employer "is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Applying this standard to the facts as they are presented here, we find, contrary to the Regional Director, that Petitioner's Objections 1 and 5 should be overruled.

By its memorandum, the Employer provided a recent, concrete example of a negative outcome for employees who were represented by the same union that seeks to represent the Employer's employees. The memorandum described a series of events—a year of negotiations followed by the union's rejection of an employer's final offer—that resulted in the employees losing their jobs. Interestingly, our dissenting colleague omits a significant fact in the Employer's memorandum account of what happened at the hotels of the other employers. That significant fact is that the Union rejected the Employer's offer, and that rejection prompted the events which followed.

Further, the memorandum did not say that these same incidents were going to happen if its employees voted in favor of union representation. On the contrary, it noted, "each set of negotiations is different." Finally, our dissenting colleague says that the Employer made a prediction that was objectionable, i.e., it did not convey its belief "as to demonstrably probably consequences beyond [its] control." The answer to our colleague is that the Employer made no prediction at all. It said that "each set of negotiations is different." In sum, the Employer simply described what *could* happen; it was not predicting what *would* happen. We therefore find that the Employer's memorandum did not, under all these circumstances, convey a threat of reprisal if the employees selected the Petitioner as their collective-bargaining representative but rather that it comes within the range of permissible campaign conduct. See *Novi American, Inc.*, 309 NLRB 544 (1992); *Caradco Corp.*, 267 NLRB 1356 (1983). Accordingly, we overrule Petitioner's Objections 1 and 5 and, as the Petitioner has failed to secure a majority of the valid ballots cast, we shall certify the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Brotherhood of Security Personnel Officers and Guards Union and that it is not the exclusive representative of these bargaining unit employees.

Dated, Washington, D.C. April 28, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting.

The Regional Director correctly found that the Employer interfered with the election by threatening employees, in a memorandum sent a week before the election, that unionization would result in the loss of their jobs and benefits.[1] Accordingly, I dissent from my colleagues' overruling of the Petitioner's Objections 1 and 5.

The applicable legal principles are not in dispute. An employer may "communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). An employer may even make a prediction as to the precise effect he believes unionization will have on the company. The prediction, however, must be "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond [its] control." Id. at 618; see also *Quamco, Inc.*, 325 NLRB 222, 223 (1997).

In the present case, the Employer's memorandum begins with the warning that if employees still believe they have nothing to lose from unionization, they should know what happened after a year of negotiations with the Petitioner at two other hotels: the employer broke off negotiations, subcontracted out the employees' jobs, and fired all the employees. The memorandum emphasizes that those employees "gained NOTHING, and LOST EVERYTHING"—their medical benefits, their 401K plan, and their jobs. The memorandum states that the Employer's employees have good wages and benefits and asks, "Why would you pay someone for the possibility of losing this arrangement?" The memorandum concludes by warning employees to remember on election day what happened at the other two hotels. The Regional Director correctly found that the memorandum was objectionable, because it conveyed the threat that unionization would lead to the loss of employees' jobs and benefits.

Contrary to the Regional Director, my colleagues find that the memorandum was not objectionable. Emphasizing a statement in the memorandum that "each set of negotiations is different," they find that the memorandum did not say that the same incidents that happened at the other hotels would happen to the Employer's employees if they voted in favor of union representation. Therefore, my colleagues find that the memorandum did not convey a threat of reprisal.

I disagree. As the Regional Director found, the memorandum was a clear attempt to communicate the message

[1] The text of the memorandum is set forth in full in my colleagues' decision.

that unionization at the other two hotels caused those employees to lose their jobs and benefits, and that unionization would likewise cause the Employer's employees to lose their jobs and benefits. Simply stating that "each set of negotiations is different" is not sufficient to neutralize that message. Furthermore, the Employer offers no statement of objective facts supporting its suggestion that its employees would suffer the same fate as those at the other two hotels. Finally, although the memorandum blames the Union for the loss of the jobs and benefits at the other hotels, the memorandum actually discusses conduct—subcontracting out work and firing employees—that is within the Employer's control rather than the Union's control. Therefore, the memorandum does not "convey [the] employer's belief as to demonstrably probable consequences beyond [its] control." *Gissel*, supra at 618; *Quamco*, supra at 223. Instead, employees reasonably would understand the memorandum as a threat that unionization would cause them to lose their own jobs and benefits, just like employees at the other two hotels.[2] Accordingly, the Regional Director correctly found that the Employer engaged in objectionable conduct that interfered with the election. The election should be set aside and a new election held.

Dated, Washington, D.C. April 28, 2004

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

[2] The cases cited by my colleagues are distinguishable. *Novi American, Inc.*, 309 NLRB 544 (1992), did not involve references to employees at other, unionized plants. In *Caradco Corp.*, 267 NLRB 1356 (1983), the employer stated in campaign speeches that wage reductions had been negotiated at some of his unionized plants. In concluding that the statements were not objectionable, the Board specifically found that the employer did not "suggest that those plants' experience had any application" to the plant at which the election was being held. 267 NLRB at 1357. In the present case, the Employer's memorandum expressly instructed employees to remember on election day what happened at the other two hotels.